SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

THE PRESS CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent;

TRI-CITY NEWSPAPER GUILD ET AL.,

Intervenors-Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Preliminary Statement.

The opinions below, the statement of the matter involved, jurisdiction and the questions presented appear in the Petition for a Writ of Certiorari herein and in the interest of brevity are incorporated here by reference.

II.

ARGUMENT.

Summary of Argument.

Point I. Petitioner's operations do not affect commerce in such a direct and substantial manner as to enable the

Board to exercise jurisdiction over its labor relations. In the circumstances of this case a novel and important question of commerce is presented.

Point II. The enforcement by the court below of paragraph 1 (b) of the Board's order directed against surveillance constitutes a material departure from the course of judicial review under the Act as interpreted by this Court because it is based upon findings of fact made independently by the court below and not found by the Board. A significant Federal question requiring the exercise by this Court of its power of supervision is thus presented.

Point III. The court below erroneously regarded as substantial evidence of discriminatory discharges inferences drawn from the failure of one person to testify where such inferences were relied upon to give vitality to circumstantial evidence otherwise regarded by the court as lacking in rational probative force. This unique question of judicial review should be passed upon by this Court.

Point IV. The order of the Board constitutes an infringement of the freedom of the press as guaranteed by the First Amendment to the Constitution of the United States by a particular form of abridgment not heretofore reviewed by this Court.

Point V. The proceedings, findings and order of the Board violate petitioner's substantial rights as guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States. This fundamental question of constitutional right is presented under circumstances never before reviewed by this Court.

Point VI. Paragraph 1 (c) of the Board's order as modified by the court below is in conflict with the principles announced by this Court in *NLRB* v. *Express Publishing Com-*

pany, No. 442, this Term, decided March 3, 1941. The grave uncertainties created by the vague contours of the language of this paragraph present an important question which should be clarified by this Court in the interest of litigants who otherwise will be exposed to undue risks of contempt proceedings.

Point I.

Petitioner's operations do not affect commerce in such a direct and substantial manner as to enable the Board to exercise jurisdiction over its labor relations. In the circumstances of this case a novel and important question of commerce is presented.

The court below failed to discharge its judicial duty of ascertaining whether, on the facts of this case, petitioner's activities affected commerce in such a close and substantial manner as to render regulation necessary or appropriate for the protection of commerce. Instead, it merely recounted certain of the Board's findings with respect to petitioner's operations and, without any analysis of the effects of the facts found on interstate commerce in the light of the criteria announced by this Court, disposed of petitioner's contentions by holding that

> "This is a sufficient finding that Press Co.'s operations affect interstate commerce under the rule announced by the Supreme Court in *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and in *Labor Board* v. *Fainblatt*, 306 U. S. 601, 607, in which it is said that the regulatory power of Congress over interstate commerce is not dependent upon whether the volume is great or small." (R. 1310.)

The court below went to lengths never gone to by this Court in upholding Federal intervention in an inherently local business. Petitioner submits that this Court should review that important Federal question.

This Court has uniformly held that manufacturing and activities analogous thereto are not commerce. *United States* v. *F. W. Darby Lumber Co.*, 60 Sup. Ct. 451, 456 (1941). And see *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 34 (1937) and cases therein cited. The business of publishing a daily newspaper is well within this rule.

Since the production of a daily newspaper is not commerce, the Board had jurisdiction only if the illegal activities alleged to have occurred in this case had or tended to have the requisite direct and substantial effect upon interstate commerce. Only by a careful analysis of the facts surrounding petitioner's business can it be determined whether such effect could ensue from the practices found to be in violation of the Act.

This Court has held that the business of preparing, publishing and printing a daily newspaper is peculiarly local and distinct from its circulation whether or not that circulation crosses state lines. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). And see *Blumenstock* v. *Curtis Publishing Co.*, 252 U. S. 436 (1920).

The record herein demonstrates that petitioner is engaged in a purely local business, that of furnishing information in the form of news, editorial comment and advertising of importance to the people in the area immediately surrounding Albany, the place of publication.

The court below erroneously stated that 2,000 out of a total in excess of 45,000 copies of petitioner's newspapers circulated outside the State of New York (R. 1310). No such finding was made by the Board (R. 1217-1218). At no time did the out-of-state circulation of any of petitioner's newspapers reach that figure (R. 1217-1218) and in September, 1937, a month typical of petitioner's circulation since its reduction of operations, only 559 copies out of a total of 55,875 of petitioner's newspaper circulated outside the State of New York, despite the close proximity of Al-

bany to cities and towns in Vermont and Massachusetts (R. 107, 1217). This trivial out-of-state circulation is merely incidental to petitioner's primary function of making available to residents of Albany and its vicinity information about matters of importance to them.[1]

Petitioner's trifling out-of-state circulation is characteristic of the newspaper publishing business. This is illustrated by the circulations of other newspapers affiliated with the Gannett Company. The Rochester Democrat & Chronicle for the year ending September 30, 1937 had an average circulation of 81,239 of which less than 410 copies (less than ½ of 1 per cent) were sent to subscribers in states other than New York (R. 198). The average circulation of the Rochester Times-Union for the same period was 82,208. Of these, an average of only 206 (less than ¼ of 1 per cent) circulated in other states (R. 198). The exhibits herein contain detailed information concerning the circulation of 16 newspapers affiliated with the Gannett Company.[2] Out of a total circulation of 402,508 only 12,-

[1] That petitioner's operations are of purely local importance is equally forcefully demonstrated by the extent to which circulation is concentrated in Albany and its periphery. The Knickerbocker Press, the morning newspaper published by petitioner until its union with the Albany Evening News, had an average net paid circulation of 25,639 for the twelve month period ending September 30, 1936 (Bd. Ex. 26). Of that circulation, 48 per cent was distributed entirely within the "city zone", comprising the area within the corporate limits of Albany, Renssalaer and Menands, New York. An additional 24.8 per cent was distributed within the "retail trading zone", an area which extends north to Ballston Spa (30 miles), east to Lebanon Springs (22 miles), south to Catskill (31 miles) and west to Cobleskill (45 miles) and includes all intervening points except those included in the city zone (Bd. Ex. 26). Of the circulation of the Sunday edition of the Knickerbocker Press, 80 per cent was distributed within the city and retail trading zones (Bd. Ex. 26).

For the same period the Albany Evening News had an average net paid circulation of 41,847, of which 53 per cent was distributed within the city zone and an additional 31 per cent within the retail trading zone (Bd. Ex. 27).

[2] Detailed figures are set forth in Appendix A at page 60.

672 are distributed in states other than the state of publication, an average out-of-state circulation of 3.15 per cent. Even this insignificant out-of-state circulation total includes newspapers published in cities located close to state lines, whose retail trading zones extend into two states. Omitting those newspapers from the calculation, the total circulation is 338,819 and the out-of-state circulation is 2,214 or less than ⅔ of 1 per cent.

These figures conclusively demonstrate that not only the business of this petitioner, but that of the newspaper publishing business in general is of exclusively local as distinguished from national interest.

It therefore becomes of utmost importance to bear in mind the circumstances in which this Court has held that labor relations are subject to the regulatory power of Congress.

In *Associated Press* v. *NLRB*, 301 U. S. 103 (1937) the employer held subject to the Act was directly engaged in interstate communication.

It would be both presumptuous and a work of supererogation to enlarge upon the principles applied by this Court in cases involving labor relations in industrial activities.[3] None of these cases is determinative of the issues herein. In each case the employer was dependent upon the channels of commerce for the distribution of his product. This is not the fact herein.

The *Jones & Laughlin* case, relied upon by the court below, involved the fourth largest producer of steel in the United States, a corporation which, with its nineteen sub-

---

[3] *NLRB* v. *Jones & Laughlin Steel Corp., supra.*
NLRB v. *Fruehauf Trailer Co.*, 301 U. S. 49 (1937).
NLRB v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58 (1937).
Santa Cruz Fruit Packing Co. v. *NLRB*, 303 U. S. 453 (1938).
Consolidated Edison Co. v. *NLRB*, 305 U. S. 197 (1938).
NLRB v. *Fainblatt*, 306 U. S. 601 (1939).
NLRB v. *Bradford Dyeing Association*, 310 U. S. 318 (1940).

sidiaries, constituted a completely integrated enterprise owning and operating numerous mining properties and interstate transportation facilities.

This Court has said that a mere reference to percentages cannot be deemed controlling on the question of whether specified activities affect commerce. Cf. *NLRB* v. *Fainblatt*, 306 U. S. 601, 606 (1939). But this language was used with reference to industries dependent upon the channels of commerce for the distribution of their products, in which a vast number of units contribute in the aggregate a tremendous volume of interstate commerce and industries in which the total effect upon commerce of the practices of many small producers may be great.

The publication of daily newspapers is a business which operates in a manner diametrically opposed to that of the manufacturing, processing and packing industries involved in the above-mentioned cases. The dominant aspect is not nationwide distribution of goods but service to the community in which the individual unit of the business is located (R. 107; Appendix A at page 60). The service rendered by each unit is peculiarly adapted to a strictly limited area.

The lack of relation of this petitioner to interstate commerce, when considered in conjunction with the peculiarly local nature of the business as a whole, establishes that regulation of the labor relations of employers and employees engaged therein is a matter of purely local concern, beyond the scope of the power of Congress "to regulate Commerce * * * among the several States".

Petitioner's membership in the Associated Press has been asserted as a basis of jurisdiction (R. 1218, 1310).

The contention is that if an unfair labor practice should lead to a strike among petitioner's employees and if this strike should force petitioner to cease publication, the Associated Press' interstate business would be affected. The

Board has insisted that it is entitled to regulate petitioner's labor relations in order to protect the Associated Press' interstate activities from the effect of a stoppage of work by petitioner's employees.

Because petitioner is one of its members, the Associated Press is entitled to use certain news dispatches published in petitioner's newspaper (R. 174-175, 1206). The Board has found that "The Albany office of the Associated Press sends out about 36,000 words a day, about 200 or 300 of which usually are taken from material furnished by the respondent Press Co." (R. 1218). These 200 words go only to one point in Pennsylvania (R. 176). Before leaving the state over any wire, the story is sent to New York, rewritten and cut to 75 words (R. 176).

If petitioner's editorial employees should cease working, the greatest possible effect upon the interstate business of the Associated Press would be the loss of material from which it takes an insignificant part of its outgoing news.

The record shows that the Associated Press is in no way dependent upon petitioner for Albany coverage. The Associated Press maintains its own bureau in Albany in which there are eleven editorial employees of the Associated Press (R. 169). Further, the Associated Press had another Albany member (R. 171).

The Board also found that the Associated Press supplies petitioner with a substantial number of the news dispatches which it uses each day (R. 1218). It has not explained how petitioner's failure to take this news would affect the transmission of news in any way. The record demonstrates that it would not (R. 168-179).

If petitioner took no Associated Press news whatsoever, the same amount of news would have to be sent to the Albany office so that it could service the newspapers which depend upon the New York State relay wire and at the same

time supply its other Albany member with news (R. 170-171).

Petitioner submits that a stoppage of work among its editorial employees would not burden or obstruct the interstate activities of the Associated Press in such a substantial manner as to permit the Board to use petitioner's Associated Press membership as a basis of jurisdiction. The record contains no proof of any possible damage to the Associated Press if petitioner suspended operations altogether.

The court below relied in part upon the receipt by petitioner of advertising and feature material from other states in supporting the jurisdiction of the Board (R. 1310). There is nothing in the record to show that a direct or substantial burden on commerce would result from a failure to receive these materials.

Moreover, this Court has held that "the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce". *Western Live Stock* v. *Bureau of Revenue, supra* at page 258.

No logical distinction can be drawn between the publication of advertising and the publication of features so far as the "peculiarly local" character of the business is concerned.

In its description of petitioner's business the Board found that petitioner uses raw materials which are shipped to it across state lines (R. 1218). It further found that the raw materials used by petitioner represent 10 per cent to 30 per cent of the cost of producing its newspaper (R. 1218).

But this Court has never found that commerce would be burdened or obstructed in the requisite direct and substantial manner by an employer's failure to use raw materials originating outside the state.

In the *Consolidated Edison* case the employer was almost completely dependent upon raw materials, supplies and equipment shipped to it from other States.

> *Consolidated Edison Co.* v. *NLRB*, 95 F. (2d) 390, 393 (C. C. A. 2d, 1938).
>
> Record in *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197 (1938) at pages 1364-1371.

In its decision this Court dismissed these vast purchases, holding instead that the jurisdiction of the Board was founded upon the necessity of the employer's unhampered operation to the function of interstate transportation facilities. *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197 (1938).

The Board's power does not extend to the removal of remote and indirect effects. If it did, every intrastate transaction involving interstate transportation by others would come within Federal control and thereby put an end to our Federal system. The local merchant referred to by the Second Circuit in the *Consolidated Edison* case [4] would fall under the Board's aegis. On his shelves one finds pineapple from Hawaii, fruit from California and Florida, potatoes from Idaho and Maine, spices from foreign lands, a host of other food products brought from every corner of the globe.

> "The authority of the Federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system".
>
> *NLRB* v. *Jones & Laughlin Steel Corp., supra*, at page 30.

---

[4] 95 F. (2d) at pages 393-394.

Because of improved methods of communications and transportation nearly everything we do in modern life has some effect on commerce. But if these "centripetal forces are * * * isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our Federal system".

Per Cardozo, J., in *Schechter Poultry Corporation* v. *United States,* 295 U. S. 495, 554 (1935).

Federal intervention in matters of local concern may be justified only where commerce is affected in a direct and substantial manner. Petitioner submits that its activities are without such effect.

Point II.

The enforcement by the court below of paragraph 1 (b) of the Board's order directed against surveillance constitutes a material departure from the course of judicial review under the Act as interpreted by this Court because it is based upon findings of fact made independently by the court below and not found by the Board. A significant Federal question requiring the exercise by this Court of its power of supervision is thus presented.

The court below sustained paragraph 1 (b) of the Board's order directed against surveillance by a course of judicial review directly contrary to that required by the Act as interpreted by this Court.

In *NLRB* v. *Waterman Steamship Corp.,* 309 U. S. 206 (1940) this Court warned that the Board has the exclusive power to find the facts. This Court also declared in *NLRB* v. *Link-Belt Co.,* 311 U. S. 584 (1941) that "Congress entrusted the Board, not the courts, with the power to draw inferences from the facts".

The review of the evidence of surveillance by the court below ignored the foregoing limitations upon the scope of judicial review.

In order to demonstrate this it is necessary to trace each step taken by the court below in its review of this phase of the case. The court below first reviewed the testimony of Alice Raymond, the private secretary of Lewis, petitioner's editorial director, to the effect that

> "• • • it was Lewis' habit, after Guild meetings, to write to Rochester; that the general nature of the letters was 'what went on at the meetings and what the Guild was planning'; that Miss Scott and Scannell were mentioned in the correspondence; and that the letters to Rochester were much more frequent before the contract with the Guild than afterwards" (R. 1315).

How did the court below regard this evidence? It stated that the testimony

> "shows no more than that the correspondence contained references to the activities of the Guild and two or three of its members" (R. 1315).

The court below admitted that (a) the reference to Miss Scott is not significant since she was retained with an increased salary (R. 1315); (b) the reference to Scannell "tends to justify Lewis' action in dismissing him, since it related not to union activity, but to his failure to comply with Lewis' instructions in the work he was given to do" (R. 1315); (c) the "reference to Wanhope is unexplained, except that Lewis regarded him as a 'red' " (R. 1315).

Yet the foregoing was the evidence upon which the Board found that petitioner had kept the Guild under surveillance in violation of Section 8 (1) of the Act.[5] Apparently at this

---

[5] In its decision the Board said:

"The record does not disclose the method by which Lewis secured his information concerning the Guild which was the subject of his Monday report to 'Rochester'" (R. 1222).

point the court below was not satisfied that this evidence supported the Board's finding of surveillance.

But in any event the court below refused to sanction the conclusion of the Board that surveillance *ipso facto* violated the Act (R. 1315). Without passing directly upon this question the court below, after in effect rejecting the Board's findings, proceeded to arrive independently at two findings of fact not found by the Board in order to support the Board's finding of surveillance and to supply a factor essential to the causation that the surveillance interfered with Guild activity.

The court below found a preliminary fact based upon (a) "evidence that on the day following the Guild meetings Lewis was in possession of detailed information concerning what went on at the meetings and what the Guild was planning" (R. 1315) and (b) "further evidence (*not referred to by the Board*) that during a number of conferences Lewis assured employees that 'they [the employers] were well apprised of what was happening in the Guild'" (R. 1315). (Emphasis supplied.)

Apart from the objection that there is no support in the record for the court's statements, from the foregoing course of review nothing can be plainer than that the court below arrived at a finding of preliminary fact not found by the Board and based in part on evidence not even referred to by the Board. This finding of fact also involved inferences not drawn by the Board and drawn by the court below from a fact which the Board did not find. *NLRB* v. *Waterman Steamship Corp., supra,* and *NLRB* v. *Link-Belt Co., supra,* forbid such a clear departure from the course of judicial review contemplated by the Act.

But this is not all. The court below next stated:

> "Taken in conjunction with Lewis' failure to explain how he acquired his information, this evidence tends to

> show that he kept himself informed by some means of the Guild's plans, and this we think may be called surveillance." (R. 1315.)

In the light of the court's refusal to sanction the view that surveillance unaccompanied by coercion, interference or restraint is in violation of the Act, the foregoing evidence would merely establish that Lewis acquired knowledge. The court below supplied the missing link by making another finding of fact—this time an ultimate fact—as stated in the opinion:

> "In any case, the substantiated finding that Lewis later dismissed employees for their Guild activities supports the conclusion that the knowledge thereby acquired did actually interfere with union activity." (R. 1315.)

The Board found only that there was surveillance (R. 1223). It did not find that the surveillance interfered with Guild activity. The court below supplied this missing link itself by finding an ultimate fact to establish a causation not found by the Board but upon which the validity of paragraph 1 (b) of the Board's order depended.

In so doing the court below exercised a fact-finding power which Congress entrusted exclusively to the Board.

A significant Federal question requiring the exercise by this Court of its power of supervision is thus presented.

Point III.

The court below erroneously regarded as substantial evidence of discriminatory discharges inferences drawn from the failure of one person to testify where such inferences were relied upon to give vitality to circumstantial evidence otherwise regarded by the court as lacking in rational probative force. This unique question of judicial review should be passed upon by this Court.

The court below deemed "the real bone of contention in this case" to be the question of whether Lewis, petitioner's editorial director,

> "purposely availed himself of the opportunity to reduce his staff in order to relieve himself of the presence of certain officers and members of the Guild whose union activities he personally did not relish or approve" (R. 1312).

There was no direct evidence on this question. But the Board's conclusion that Lewis discriminated against Guild members (R. 1224-1228) was said by the court below to rest upon inferences drawn from circumstantial evidence described by the court in the following terms: oral statements of Lewis; his asserted familiarity with the activities of the Guild; his failure to testify; the excessive proportion of Guild members selected for dismissal; a rather casual appraisal of the relative merits of employees (R. 1312).

Upon close analysis of the opinion, it will be seen that in the view of the court below all of the inferences which were drawn from the circumstantial evidence hereinabove described came into being only because of Lewis' failure to testify. None of the circumstantial evidence mentioned by the court below had any separate legal significance. It was Lewis' failure to testify which was deemed by the court below to give vitality to the circumstantial evidence and to infuse into that evidence a rational probative force which the court felt was otherwise lacking.

Any doubt that this was the court's position is dispelled by the following paragraph from its opinion:

> "*If, in this state of the record, Lewis had gone on the witness stand and testified* that he had exercised the right to discharge Scannell, Wanhope, and Christman because he was able to retain other men who were their superiors in the work of the newspaper, or because

of any dereliction on their part in the discharge of their duties, or that in making his selections he had weighed the relative merits of those whom he retained and those whom he discharged and had based his selection on the ground of merit alone, *the case would have a different aspect. But since he refrained from testifying at all, we are unable to say that the factor of Guild activity, which the Board considered the real cause, can be said to be without support in the evidence.*" (Emphasis supplied.) (R. 1312.)

The foregoing paragraph establishes that the court below in reality held that the inferences which were drawn from the circumstantial evidence otherwise inert became substantial evidence merely by reason of Lewis' failure to testify.

Such inferences cannot satisfy the requirement of substantial evidence defined by this Court in *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229 (1938) as

> "* * * such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".

Since the court below considered all of the inferences from the circumstantial evidence to be dependent for their existence upon the inference from Lewis' failure to testify, such inferences could not constitute evidence

> "* * * to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury". *NLRB* v. *Columbian Enameling and Stamping Co.*, 306 U. S. 292, 300 (1939).

One need only read the part of the opinion of the court below dealing with the question of circumstantial evidence to see how the entire case was made to turn around Lewis' failure to testify. On virtually every other phase of the case the review of the evidence was favorable to the peti-

tioner's contention that there was no substantial evidence to support the Board's findings of fact. The only exception is surveillance, but it has already been shown that the Board's finding of surveillance was bolstered by a finding of preliminary fact improperly made by the court below itself and that the court below made another finding of ultimate fact to supply the link of interference with Guild activity essential to the enforcement of paragraph 1 (b) of the Board's order.

On every other phase of the evidence the court below found that there was no support for the Board's findings of fact. Lewis' oral statements alone were held to constitute proper expressions of opinion (R. 1311), and it was unequivocally held that his statements did not have the effect of coercing employees in the rights guaranteed by the Act (R. 1312). In the opinion it was twice stated that there was no evidence or finding of hostility on the part of any other executive of petitioner (R. 1312, 1317-1318).

But on the question of Lewis' bias, the court below, despite its forthright statement "that the case would have a different aspect" if Lewis had testified (R. 1312), was content to find substantial evidence in inferences that had their inception solely because of the failure of one person to go on the witness stand (R. 1313).

The fact that Section 10 (b) of the Act provides that in hearings before the Board or its agents "the rules of evidence prevailing in courts of law or equity shall not be controlling", cannot avail to dispense with the fundamental concepts of fairness, relevancy, probative force, and common sense. In the light of these standards mere inferences from failure to testify without support in other evidence of reasonable probative force cannot be deemed substantial evidence upon which the Board's order is required by the Act to rest. This unique question of judicial review should be passed upon by this Court.

The danger of relying exclusively upon mere inferences from failure to testify is further illustrated by the absence of substantial evidence to support the Board's findings that Scannell, Wanhope, and Christman were discharged because of discrimination against Guild members.

The court below held there was no substantial evidence to sustain the Board's finding that Lewis had coerced Guild employees (R. 1312). Without the aid of findings of fact which it made independently of the Board, the court felt that the testimony of Lewis' private secretary, Alice Raymond, did not establish surveillance (R. 1315). But on the issue of Lewis' bias against the three editorial employees herein involved the court below, as previously shown, regarded as substantial evidence of discrimination the inferences from Lewis' failure to testify.

The record conclusively establishes that there was no discrimination against Guild members (R. 867-868, 771-772, 836, 983, 1029, 1051, 1073, 1079). In the interest of brevity only a summary of the salient features is here given. The record shows that Scannell was an obstructionist who habitually failed to comply with instructions of his superior, Lewis (R. 691). His work was criticized by Lewis and by Hyde, the managing director (R. 407, 408, 430, 691). In its review of Miss Raymond's testimony the court below said that her recollection of the reference to Scannell in the letters she wrote "tends to justify Lewis' action in dismissing him, since it related not to union activity, but to his failure to comply with Lewis' instructions in the work he was given to do" (R. 1315).

The record shows that Wanhope lacked versatility and was uncooperative (R. 410, 523, 862). He admitted he was a one-type of story writer and that he could not write stories which required a light touch, which stories, in his

opinion, were "simply tripe" (R. 523). He further testified that if asked to handle such stories he would not do so (R. 523). Wanhope was adversely criticized by staff members among whom he created friction. Scannell testified that over a period of years there was constant friction between him and Wanhope; that he reported to Lewis that Wanhope "was deliberately trying to pile up overtime" (R. 409). Wanhope admitted that he used abusive language to fellow employees over the telephone and that there were constant complaints about it (R. 513).

The record shows that Christman's work was distinctly below average, sloppy, and inferior, and that in any reduction in staff he should have been among the first to go (R. 540, 988). Christman testified that his reason for joining the Guild originally was because he felt insecure in his position with petitioner (R. 541). But this feeling of insecurity existed long before he became a member of the Guild and could not have been attributable to any Guild activity since at that time he had engaged in none.

It should also be noted that Christman was the employee who had possession of the stenographic notes of Lewis' confidential secretary, Miss Raymond, and that he brought these notes to her and requested her to transcribe them (R. 694-695). Christman refused to reveal to Miss Raymond the manner in which he obtained the notes (R. 694). On this point the court below stated that "The manner in which her evidence was secured reflects no credit upon the Guild" (R. 1314).

Thus this Court is called upon to decide whether it is an unfair labor practice under the Act to discharge in good faith and on the basis of merit and fitness three editorial employees whose discharges were necessitated by petitioner's reduction of operations.

Point IV.

The order of the Board constitutes an infringement of the freedom of the press as guaranteed by the First Amendment to the Constitution of the United States by a particular form of abridgment not heretofore reviewed by this Court.

This Court has never had occasion to consider the particular form of abridgment of the constitutional guaranty of a free press presented by the record in this case.

No exegesis of the basic freedom of the press [6] and related freedom of speech [7] cases decided by this Court is necessary to demonstrate that the protection of the First Amendment extends to any form of legislative interference with the judgment of the publisher in the determination of the policies and contents of his publication and its dissemination.

In this case the Board as an agency of the Congress claimed the power to require petitioner to lay before it for review the reasons why one editorial employee was selected as against another (R. 1225).

Petitioner contended that by reason of the First Amendment the Board has no such power (R. 54-56, 66-67, 76, 85, 1173). On the issue of fact of whether the discharges in controversy here were discriminatory all the Board could constitutionally require under the circumstances of this case was a showing that these discharges were not made because of the Guild membership and activities of the editorial employees in question.

---

[6] *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147 (1939).

[7] *De Jonge* v. *Oregon*, 299 U. S. 353 (1937); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Carlson* v. *California*, 310 U. S. 106 (1940). See also *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).

Such a showing was made by overwhelming positive evidence in the record with respect of the following:

1. When faced with an unavoidable reduction of operations necessitating the discharge of more than 150 employees in all departments (R. 110, 1224), petitioner's publisher instructed department heads to retain persons best equipped to serve on the basis of fitness and merit (R. 821, 1100-1101).

2. This policy was applied in the editorial department where the discharges were governed wholly by considerations of fitness and merit (R. 54-55) and without regard to Guild affiliation and activities (R. 54, 55, 1100-1101).

3. The selections for discharge were approved by the publisher (R. 822, 1103).

4. Witnesses called by petitioner and by the Board fully established that Guild membership and activities never resulted in any act of discrimination by any of petitioner's executives, including Lewis (R. 822-823, 1100-1101, 867-868, 771-772, 836, 983, 1029, 1051, 1073, 1079).

5. There was no substantial evidence to the contrary.

Despite this state of the record the court below sustained the Board's findings that Scannell, Wanhope and Christman were discharged because of Guild activity (R. 1310-1313).

But as heretofore shown, there was no direct evidence on this question. As viewed by the court below the pivot on which the issue of discrimination—and in reality the entire case—turned was the inferences drawn from circumstantial evidence (R. 1312). All of these inferences came into being only because of the failure of Lewis, petitioner's editorial director, to testify concerning why he chose one editorial worker as against another. Without these inferences the

court below said "the case would have a different aspect" (R. 1312). Upon these inferences rested the conclusion of the court below that there was substantial evidence to support the Board's findings of discriminatory discharges.

Petitioner submits that the First Amendment precluded the Board from drawing unfavorable inferences from Lewis' failure to testify.

The question here is not the reasonableness of such inferences. It is a question of the existence of power to draw them. It would have been inconsistent with petitioner's claim of constitutional immunity from interference with its judgment as to the relative merits of particular editorial employees to have offered Lewis as a witness. Under such circumstances, silence cannot become evidence of any character. No such Federal question has even been presented to this Court for decision.[8]

---

[8] In fact, the court below did not cite any controlling authority. It merely cited for comparison the four cases discussed below (R. 1313) which are clearly distinguishable.

In *Montgomery Ward and Company* v. *NLRB*, 107 F. (2d) 555 (C C. A. 7th, 1939), the assistant to the plant manager made speeches and held conferences with individual employees during a campaign to unionize the plant. These statements were held to manifest strong anti-union sentiment and an earnest effort and plan to prevent unionization. Hence they transgressed the permissible bounds of free expression by an employer of his views on unionization. The inference of discriminatory discharges was deduced largely from this evidence. Montgomery Ward did not challenge the Board's order as a violation of the First Amendment. In the instant case, the inferences were drawn from Lewis' failure to testify. The court below held that his statements were within the permissible bounds of free expression of opinion by an employer and were not coercive. The inference of discrimination was drawn from his failure to testify.

In *NLRB* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d, 1938) there was no contention that the First Amendment had been violated. In that case an employee of ten years standing, who was a picket during a strike, was the only employee the company refused work. No explanation for his discharge was given by the employer.

Nothing in *NLRB* v. *Mackay Company*, 304 U. S. 333 (1938), is even remotely related to the issues herein. Respondent did not contend that the Board's order violated the First Amendment and the court did not consider the question.

The court below misapprehended a vital point when it said that petitioner contended that "freedom of the press permits a publisher to withhold the basis of his selection of employees" (R. 1312) and that petitioner refused "to testify in denial of union discrimination and in frank explanation of the grounds for selection and dismissal of editorial workers" (R. 1313).

Petitioner at no time refused to reveal the basis or grounds for selection of its editorial employees. They are repeatedly disclosed in the record as fitness and merit and are corroborated by witnesses called by the petitioner and by the Board's own witnesses (R. 54-55, 821-822, 1100-1101, 1103). What petitioner refused to do was to account to the Board for the publisher's exercise of judgment that the individual editorial employees retained were superior to the individual employees discharged.

The First Amendment vouchsafes to the publisher the final responsibility for the selection and assignment to work of editorial employees deemed by him to be qualified by fitness and merit to effectuate the editorial policies of his newspaper. There is no yardstick by which the value of the services of an editorial employee can be gauged other than the judgment of the persons responsible for the publication of the newspaper. The value and effectiveness of the work of editorial employees depend upon such qualities as personality, ambition, imagination, creative ability, independence of mind and diverse and special talent. The fitness and merit of a particular editorial employee is exclusively a matter of appraisal of the individual (R. 55).

In *Interstate Circuit* v. *United States*, 306 U. S. 208 (1939), the constitutional guaranty of the First Amendment was not involved. The case concerned proof of a conspiracy in violation of the Sherman Anti-Trust Act among motion picture distributors who were charged with acting in concert to impose restrictions upon their licensees. Every one of the distributors failed to testify as to the alleged agreement and there was substantial evidence other than the inference from silence to support the concerted action.

If petitioner had acceded to the Board's claim of power to review the publisher's judgment in appraising the relative merits of particular individuals it would have surrendered and transferred to the Board the final responsibility for the editorial policies of its newspaper.

If the publisher must justify to the Board his individual choices of editorial employees, apart from a showing that union affiliation and activities were excluded from consideration, then a "pervasive threat" of censorship[9] inherent in the very existence of the asserted power to review will hang like a heavy pall over the editorial department of a newspaper. Behind every difference of judgment between the publisher and the Board affecting individual employees would lurk the threat of a charge of discrimination against union members despite a record replete with evidence to the contrary.

That this is no idle fear is demonstrated in this case by the fact that every matter concerning which Lewis could have been asked to testify in denial of union discrimination without violation of constitutional rights was fully covered by the testimony of witnesses called by petitioner and the Board.

The court below failed to distinguish *Associated Press* v. *NLRB*, 301 U. S. 103 (1937). In that case the Associated Press did not attack the finding of the Board that one Watson, an editorial employee, was discharged for Guild activities. Consequently this Court held that the Board had the power to enter its order.

By failing to present before the Board and the courts the question of the constitutional right of the publisher to discharge an editorial employee based upon criteria other than union activity, the Associated Press narrowed the issue to the power of the Board to order the reinstatement of Watson

---

[9] Cf. *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940).

upon the basis of an unchallenged finding of fact that his Guild activity was the reason for his discharge.

No such issue is under review here. Unlike the *Associated Press* case here the Board and the court below were asked to deal "upon the basis of facts disclosed" and not "with nonexistent and assumed circumstances". Cf. 301 U. S., at page 132.

The court below misapplied the holding in the *Associated Press* case by ignoring the principles clearly announced therein that the Act does not compel the employment of anyone and that

> "The Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees." (301 U. S., at page 132.)

In the *Associated Press* case there was no showing that the discharge of Watson fell within the area of the publisher's discretion in enforcing editorial policies of his own choosing. In the instant case such a showing was made at every stage of the proceeding. The record contains substantial evidence that Scannell, Wanhope and Christman were judged on the basis of merit and fitness and that their discharges were necessitated by an unavoidable reduction of operations of petitioner's newspaper, as hereinabove shown.

This Court should review the novel constitutional question thus presented.

Point V.

The proceedings, findings and order of the Board violate petitioner's substantial rights as guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States. This fundamental question of Constitutional right is presented under circumstances never before reviewed by this Court.

The court below failed adequately to discharge its ju dicial duty of passing upon a fundamental question of la presented by petitioner's contention that it had been denie a full and fair hearing as guaranteed by the due proces clause of the Fifth Amendment.

At every stage of the proceedings petitioner insisted tha it had been denied due process by being deprived of an im partial hearing (R. 51, 57, 68, 77, 218, 1173, 1207-1208 This contention was based upon the following:

A. *Circumstances prior to complaint and hearings.*

1. Prior to the issuance of the complaint and hearing thereon, officials of the Board were credited by Guild mem bers with having given assurances to the Guild of an ai tight case (Board Exhibit 86; Petitioner Exhibit 4). On witness testified that Wanhope had made a statement to th effect that the Board had said the Guild had an open-an shut case and could not lose (R. 956). Another witne testified that within a few weeks after the discontinuan of petitioner's morning and Sunday newspaper the Gui had announced that the Board had said the Guild had a open-and-shut case (R. 986).

2. These assurances must be read in the light of the si nificant fact that the Guild had withdrawn from the pr ceedings instituted before the New York State Departme of Labor wherein petitioner had agreed to be bound by t findings of the State Mediator (Board Exhibit 76, 80, 448).

B. *Circumstances during course of hearings.*

1. In its answer to the amended complaint petition alleged that the Board had disqualified itself from proceed ing by reason of its failure to observe due process (R. 6 69). When counsel for petitioner moved to dismiss for v

lation of due process, the Trial Examiner informed him that he would consult with the Board and that he would inform counsel for petitioner of "the position which the Board takes some time today" (R. 218).

2. During the course of the hearing before the Trial Examiner counsel for the Board said:

> "The Board says that the two companies have violated the National Labor Relations Act" (R. 162).

and

> "The Board's position is that both companies have violated the National Labor Relations Act" (R. 163).

3. The record shows that during the course of the hearings counsel for the Board stated that he wished to submit "an amended charge to conform to the amended complaint", saying:

> "I have not as yet drawn the amended charge, but I will.
>
> * * * * * * *
>
> "* * * That is an amended charge that the Guild is to file. It is amended in the record. I did not intend to make a formal amended complaint, but will do so if I am so directed." (R. 757.)

The foregoing reveals that before the amended complaint was served counsel for the Board considered that it was his function to act as agent of the Guild in filing amended charges upon the basis of which the complaint was amended.

C. *Circumstances during oral argument before the Board.*

1. In his Intermediate Report the Trial Examiner omitted all reference to the uncontradicted evidence in the record on the issue of due process. To this petitioner took exception (R. 1173, 1207-1208).

2. Counsel for petitioner called to the Board's attention the record evidence hereinbefore detailed and that counsel for the Board had done nothing to refute this evidence. Whereupon the Chairman of the Board asked counsel for petitioner whether he believed the Chairman or either of his two associates on the Board was guilty of making commitments to the Guild (R. 13, 1295).

3. Counsel for petitioner replied that it was unnecessary for him to answer that question, referring again at that point to the evidence in the record hereinabove detailed (R. 13-14, 1295).

4. Whereupon the Chairman of the Board again insisted upon an answer and when counsel for petitioner replied that in the light of the record it was not necessary to answer the Chairman said:

> "Mr. Hanson, you know that is sheer demagoguery for the benefit of the small audience to your rear." (R. 14, 1296.)

5. Counsel for petitioner had reserved a portion of his time for rebuttal and when opposing counsel had concluded his argument counsel for petitioner asked the Chairman of the Board how much time he had remaining. To this inquiry the Chairman replied:

> "You have four minutes if you think it will do you any good." (R. 14, 1296.)

The court below disposed of petitioner's contention on due process in the following language:

> "As to all of this, it is sufficient to say that there was no showing from which we can or should infer that either the trial examiner or the Board members had made statements showing prejudgment of the case. If any statements made by the prosecuting arm of the Board created the unfortunate impression that the case

was foreclosed before it was begun, this was the result of those provisions of the statute which combine in the same agency not only the power to investigate, initiate, and prosecute, but as well the power to hear and decide. But responsibility for such matters is with the legislature and not with us. What is complained of as later occurring in the argument, may reasonably be considered as having resulted from the implications of counsel's remarks, and we know of no rule of judicial conduct applicable either to court or board which requires silence in the face of an imputation of dishonorable conduct." (R. 1309-1310.)

The foregoing statement both misconceives the duty of the reviewing court and inaccurately characterizes petitioner's contentions for the following reasons:

1. The responsibility for due process ultimately rests upon the court and not upon the legislature. The very fact that the provisions of the statute telescope into a single agency prosecuting and judicial functions imposes upon the court an even greater responsibility to scrutinize the record for material departures from the historical and traditional processes which are of the essence of fair adjudication.[10]

Questions of constitutional right are always open to examination by the court.[11] There must be fairness in substance, tendency and effect, not mere formal fairness. Assuming that the commingling of the prosecuting and judicial functions in the same agency is attributable to the legislature, it does not follow that the court can disclaim responsibility when the results of such a combination of functions are inimical to the safeguard of a full and fair hearing. Upon the claim that petitioner has been denied due process the court has power to consider any evidence

[10] Report of Attorney General's Committee on Administrative Procedure in Government Agencies, Senate Document No. 8, 77th Cong., 1st Sess. (1941) 209.

[11] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47 (1937).

adduced before it which is relevant and material to the Board's procedural processes by which it arrives at its findings of fact.[12]

Since the court below disavowed such responsibility petitioner has no assurance that the circumstances set forth in the record and upon which its contention of violation of due process was based were given the scrutiny to which they were entitled.

The Board cannot arrogate to itself the right to sit in judgment on its own conduct in building up a record irrespective of whether the record was made with due regard for the constitutional rights of petitioner. The processes by which a decision is reached must not offend substantial rights to which petitioner is entitled under the Constitution.

[12] On the issue of constitutional right the decisions of this Court in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 51, 52 (1936) and *Morgan* v. *United States*, 298 U. S. 468, 480, 481 (1936) establish that the court has the power to make an independent judicial review to guarantee the "inexorable safeguard" of a fair and full hearing. See also *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 443 (1930), citing *Louisville & N. R. Co.* v. *United States*, 245 U. S. 463, 466 (1918). If *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573 (1940) is regarded as adopting a different view, the doctrine requires clarification by this Court.

In the court below petitioner sought to set forth in its brief numerous specific examples of departure in the Board's procedure from the accepted notions of due process taken from the Verbatim Record of the Proceedings of the House Committee Investigating the Labor Board and Wagner Act. The court below ordered this matter stricken from petitioner's brief (R. 1275) on motion of the Board (R. 1245-1251, 1267-1268) to which petitioner filed oppositions on the authority of the cases hereinabove cited in this note (R. 1251-1258, 1261-1267, 1268-1274). Petitioner contended that the court could take judicial notice of the proceedings of a public investigatory agency to assist it in making an independent judicial review to determine whether the procedures under the Act fulfilled the requirements of due process (R. 1270-1271). All of these matters were raised prior to the oral argument before the court below. Cf. *NLRB* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241 (1939); *Inland Steel Co.* v. *NLRB*, 109 F. (2d) 9 (C. C. A. 7th, 1940). Any administrative procedure which has the capacity and tendency to subject litigants to undue risks lacks what Mr. Chief Justice Hughes termed "the rudimentary requirements of fair play". *Morgan* v. *United States*, 304 U. S. 1, 15 (1938).

2. The court below in part assumed that the statements relied upon by petitioner to show prejudgment were made by "the prosecuting arm of the Board" (R. 1309). Petitioner referred to statements made before the complaint and hearings (Board Exhibit 86; Petitioner Exhibit 4; R. 956, 986) and during the hearings (R. 162, 163, 218) but at neither time did petitioner have any way of knowing what officials of the agency were credited with the statements. Petitioner is still uninformed. The statements themselves were credited to the Board. They stand uncontradicted and unchallenged in the record.

3. The court below felt that the comments of the Chairman of the Board during the argument before it, as hereinabove shown, were provoked by the retort of counsel for petitioner that it was unnecessary to answer the question of whether he believed the Chairman or either of his two associates on the Board had made commitments to the Guild (R. 1309-1310).

There is no basis in the record or in what transpired during the oral argument before the Board to justify the conclusion of the court below that the remarks of petitioner's counsel carried an imputation of dishonorable conduct.

In the light of the record counsel for petitioner would have been derelict in his duty had he failed to call the attention of the Board to matters that stood unchallenged in the record and to which the Trial Examiner made no reference in his report to the Board (R. 1173, 1207-1208). Having discharged his duty in that respect counsel for petitioner felt that the record spoke for itself. An answer to the Chairman's questions would only have served to convert an argument based upon the record into an *argumentum ad hominem* the Chairman was apparently seeking to provoke.

A charge of prejudgment is a charge of bias. Bias may be attributable to various factors. It may stem from the structure of the statute creating the agency or from the internal organization and administration of the agency or from the state of mind of the personnel of the agency or a combination of the foregoing factors. Charges of bias and prejudice have been made in other cases before the Board and were sustained by the courts.[13] In this case the record shows that officials of the Board opened themselves to the charge that they conceived their role to be that of partisans. A statute which consolidates in the same agency the functions of investigation, prosecution and decision itself creates the very processes by which freedom of quasi-judicial officers from bias or partisan viewpoints is likely to be impaired. Uncontradicted evidence in the record shows that under the circumstances of this case petitioner had more than reasonable grounds to believe that it had been deprived of the protection of due process.

Certainly a charge of bias should not be characterized as an imputation of dishonorable conduct. The system of adjudication sanctioned by the statute herein may well be so self-defeating of impartial judgment in the controversial field of labor as to lead officials sincerely to believe that it is their duty to play the role of the advocate of the employees. Lack of separation of functions increases the danger that the system may germinate this conviction in the minds of officials who were intended to perform quasi-judicial functions.[14] The blurring of the lines of division of functions itself tends to foster a state of mind in those who do the judging incompatible with dispassionateness.

---

[13] *Inland Steel Co.* v. *NLRB*, 109 F. (2d) 9 (C. C. A. 7th, 1940); *Montgomery Ward & Co.* v. *NLRB*, 103 F. (2d) 147 (C. C. A. 8th, 1939).

[14] Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, *op. cit. supra*, 203 *et seq.* Contemporary criticisms of the combination of functions in one agency are too well known to require description herein.

A charge of prejudice properly raises the constitutional issue that the Board's practices are repugnant to due process. That is the heart of petitioner's contention which the record supports by substantial evidence.

The innuendoes attributed by the court below to the remarks of petitioner's counsel are wholly unfounded. No reference was made to the affidavits in the record of persons who were present during oral argument before the Board which show that the Chairman displayed anger and feeling when he first addressed his questions to petitioner's counsel (R. 1295, 1296, 1300); that his manner was unjudicial and hostile (R. 1296, 1298, 1299, 1300); and that he spoke with a smirk (R. 1300). If any innuendoes are to be attached they cling to the statements of the Chairman of the Board to which counsel for petitioner then and there objected because of the inference and implications as well as the bare fact of the statements (R. 14, 1296).

This Court should review the fundamental question of constitutional right thus presented under circumstances never before considered by this Court.

Point VI.

Paragraph 1 (c) of the Board's order as modified by the court below is in conflict with the principles announced by this Court in NLRB v. Express Publishing Company.[15] The grave uncertainties created by the vague contours of the language of the paragraph present an important question which should be clarified by this Court in the interest of litigants who otherwise will be exposed to undue risks of contempt proceedings.

If this Court were to affirm the judicial review of the Board's findings by the court below, then an important

[15] No. 442 this Term, decided March 3, 1941.

question is presented concerning the scope of paragraph 1 (c) of the order as modified by the court below.

In its original decree the court below eliminated paragraph 1 (c) of the Board's order on the ground that there was no evidence of any interference, restraint or coercion other than discriminatory discharges and surveillance against which paragraphs 1 (a) and 1 (b) of the order are directed and which the court below sustained (R. 1331-1333).

Subsequently, upon petition of the Board for rehearing on the sole ground that the deletion of paragraph 1 (c) was error (R. 1334-1343) the court below restored the said paragraph (R. 1345-1346).

Thereafter this Court in *NLRB* v. *Express Publishing Co.*, No. 442, this Term, decided March 3, 1941, modified a paragraph of the Board's order originally expressed in language identical to paragraph 1 (c) herein. Upon request of the court below memoranda were filed by both parties concerning the pertinence of the *Express Publishing Company* decision to the present case (R. 1346-1348, 1348-1354). In its final decree the court below modified paragraph 1 (c) to read as follows:

> "In any manner interfering with the administration of the Guild or its membership" (R. 1358).

On the assumption that this Court ultimately approves the review of the evidence by the court below, it is submitted that paragraph 1 (c) as modified is not supported by the Board's findings and thus fails to conform to the principles announced by this Court in the *Express Publishing Company* case.

That case lays down the general principle that the order of the Board cannot restrain practices unrelated to and not forseeable from the past conduct of the employer concerning which the Board has made findings.

The only practices with respect to which the Board's findings were upheld by the court below are discriminatory discharges in violation of Section 8 (3) and surveillance in violation of Section 8 (1) of the Act (R. 1310-1315, 1345, 1357). If these findings are sustained by this Court, then the language of paragraphs 1 (a) and 1 (b) of the order (R. 1331-1332) would be adequate to restrain these practices and to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the petitioner in the past. This completely fulfills the purpose of an injunctive order as delimited by this Court.

If sustained by this Court, paragraph 1 (a) exhausts every persuasive resemblance to that which petitioner was found to have committed in the past and is directed against every danger of commission in the future which is to be anticipated from the past conduct found. In broad terms it encompasses discouraging membership in the Guild or any other labor organization of petitioner's employees by discharge or refusal to reinstate any of them or *in any other manner* discriminating in the hire or tenure of employment or any other term or condition of employment of petitioner's employees (R. 1331).

In equally broad terms paragraph 1 (b) orders desistance from *in any manner* exercising surveillance over the meetings or meeting places of the Guild or the union activities of its employees (R. 1332).

In the event that both of the foregoing paragraphs are finally upheld, it is apparent that the language would be adequate to prevent the order from being "evaded by indirections or formal observances".

There is no justification under such circumstances for any additional injunctive restraint. If the Board's findings are ultimately upheld, every sanction which the Board as

the fact-finding agency could claim power to include in its order as essential to the protection of the Guild and relevant to the Board's finding is embraced within paragraphs 1 (a) and 1 (b).

Paragraph 1 (c) is directed against a new violation unlike and unrelated to those with which petitioner was charged or found to have been engaged. It subjects petitioner to the peril of contempt proceedings which will hang over petitioner's head like the proverbial sword of Damocles.

Why this is so becomes apparent in the light of the judicial review of the Board's findings. In the words of the court below "the real bone of contention" was whether Lewis, petitioner's editorial director, was motivated by animosity toward the Guild in selecting Guild members for discharge (R. 1312). The court below stressed the fact that the Board has placed upon Lewis the sole responsibility for discrimination against Guild members and that there was no evidence of hostility on the part of any other executive of petitioner (R. 1312, 1317-1318). All of the unfavorable inferences drawn from circumstantial evidence of discriminatory discharges were deemed by the court below to be lifeless except for Lewis' failure to testify. Were it not for Lewis' silence the court below said "the case would have a different aspect" (R. 1312). The only other practice found to be in violation of the Act is surveillance (R. 1315).

Assuming arguendo that this judicial review is approved by this Court, in this limited aspect of the case there is no tenable theory by which paragraph 1 (c) can be viewed as within the permissible area of related acts. It is manifest that the court below did not intend paragraph 1 (c) to be construed as interference with the administration of the Guild or its membership by the means enjoined in paragraph 1 (a) and (b) of the order. It expressly stated that the conduct forbidden is interfering with the administra-

tion of the Guild and discrimination against employees in regard to tenure of employment because of their membership in the Guild (R. 1357).

Nevertheless, the court below took the view that an order of desistance from in any manner interfering with the administration of the Guild or its membership fell within the related conduct of a general nature in which petitioner was found to have engaged.

Accordingly, the court below must have meant to broaden the practice of surveillance to include new and different acts, *viz*: interference in any manner with the administration of the Guild or its membership.

The untenability of this breadth of the order is laid bare by two admissions of the court below. (1) It was conceded that the present case has a different complexion than *NLRB* v. *Fansteel Corp.*, 306 U. S. 240 (1939) (R. 1357), which this Court said "disclosed persistent attempts by varying methods to interfere with the right of self-organization in circumstances from which the Board or the court found or could have found the threat of continuing and varying efforts to attain the same end in the future". (2) The court below admitted that the forbidden conduct in this case did not include in its scope the practices denounced by Section 8 (2), (4) and (5) of the Act, except interference with the administration of a labor organization (R. 1357).

The definition and classification of the unfair labor practices in the Act clearly refute this latter exception. Interference with the administration of any labor organization is specifically prohibited in Section 8 (2) but petitioner was not charged with or found to be violating this provision of the Act.

If the findings in this case of violation of Section 8 (1) by surveillance and 8 (1) and (3) by discriminatory discharges can be related to interference with the administration of the

Guild or its membership embraced within Section 8 (2), then the court below has but revived in another guise the catch-all, blanket provision condemned by this Court in the *Express Publishing Company* case. A mere glance at Sections 7 and 8 of the Act discloses that paragraph 1 (c) in effect virtually orders desistance from any unfair labor practice in violation of the Act.

By the terms of paragraph 1 (c) each and every subdivision of Section 8 might be so interpreted as to subject petitioner to the peril of a contempt proceeding based upon an allegation, however remote, of some form of interference with the administration of the Guild or its membership. The Annual Reports of the Board eloquently testify to the myriad methods which might conceivably be given the aspect of interference with the administration of a union.[16]

From the foregoing it is evident that in the circumstances of this case, assuming that the Board's findings are affirmed by this Court, the only related acts of interference with the Guild are necessarily embraced within the terms of paragraphs 1 (a) and (b) of the order directed against the practices of surveillance and discriminatory discharges. It should not go unnoticed that the court below held that the oral statements of Lewis, around whose conduct the whole case was said to turn, fell within the allowable area of free speech and were not coercive or in violation of the Act. Said the court:

> "* * * nothing that Lewis is quoted as having said, nor the surrounding circumstances, conveys the idea that the employees had anything to fear because of their union activities" (R. 1312).

Indeed, the reason first given by the court below for the elimination of paragraph 1 (c) in its original broad form

---

[16] E.g., Third Annual Report, pp. 51-80; Fourth Annual Report pp. 57-73; Fifth Annual Report, pp. 32-53.

was that there was no evidence of coercion, restraint or interference other than surveillance and discriminatory discharges (R. 1319). Yet in the attempt to apply the principles of the *Express Publishing Company* case the court below modified paragraph 1 (c) in a manner which revives the same unwarranted blanket provision in different phraseology.

In view of the grave uncertainties created by the vague contours of the language of paragraph 1 (c), if the Board's findings were to be sustained by this Court, an important question is presented for clarification by this Court of the applicability of the principles announced in the *Express Publishing Company* case. This question of the administration of the Act should be reviewed by this Court in the interest of litigants who otherwise will be exposed to undue risks of a summons for contempt.

III.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

ELISHA HANSON,
Attorney for Petitioner.